Supreme Court, U. S.
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JUN 4 1979
MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

CASE NO. 78-1809

RICHARD EUGENE PEREZ,
Petitioner,

vs.

DARLENE STEVENS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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in the

Supreme Court

of the

United States

CASE NO.

RICHARD EUGENE PEREZ,

Petitioner,

vs.

DARLENE STEVENS,

Respondent.

BRIEF ON APPEAL OR IN THE ALTERNATIVE PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

Appellant-Petitioner, RICHARD EUGENE PEREZ, prays that this Court review by direct appeal or by Writ of Certiorari the judgment of the District Court of Appeals of Florida, Third District, entered in this case on September 26, 1978, rehearing denied October 20, 1978, and the judgment of the Florida Supreme Court denying Certiorari on March 23, 1979.

OPINION BELOW

The Opinion of the District Court of Appeals of Florida, Third District, is reported at 362 So.2d 998 and is printed in the Appendix.

The Opinion of the Florida Supreme Court is reported at and is printed in the Appendix.

JURISDICTION

The judgment of the District Court of Appeals of Florida, Third District, was rendered on September 26, 1978, rehearing denied on October 20, 1978.

The judgment of the Florida Supreme Court was rendered on March 23, 1979.

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257 under alternate theories.

Title 28 U.S.C. §1257(2) provides for a direct appeal in the case that a state statute's validity is upheld against the dictates of the United States Constitution.

Title 28 U.S.C. §1257(3) provides for a Writ of Certiorari when challenge is made to the validity of a state statute as being repugnant to the dictates of the United States Constitution.

QUESTION PRESENTED

WHETHER FLORIDA STATUTE §742.011 DEPRIVES A PUTATIVE FATHER EQUAL PROTECTION IF INTERPRETATED TO MEAN THAT A PATERNITY ACTION MAY BE INSTITUTED SOLELY BY THE WOMAN.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides that:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 7, 1977, a Petition for Final Judgment establishing the paternity of Allison Stevens was filed. On May 5, 1977, a Motion to Dismiss and/or Summary Judgment was filed by the Respondent. On November 15, 1977, the Court entered an Order on Respondent's Motion to Dismiss, dismissing the Complaint of the Petitioner with prejudice. An appeal to the District Court of Appeals of Florida, Third District, followed.

Opinion was rendered by the District Court of Appeals of Florida, Third District, on September 26, 1978, affirming the dismissal of Petitioner's cause of action. (See Appendix) Rehearing was denied by that Court on October 20, 1978. (See Appendix)

A Petition for Writ of Certiorari was filed in the Florida Supreme Court. Certiorari was denied by that Court on March 23, 1979. (See Appendix)

STATEMENT OF THE FACTS

Petitioner, RICHARD EUGENE PEREZ, caused to be filed on January 7, 1977, a Petition for Final Judgment establishing the paternity of Allison Stevens. In said Petition, he averred that he was the natural father of the unborn child, that the Respondent, DARLENE STEVENS, was the natural mother. It was alleged that the child had been born out of wedlock and that the Respondent had never married during the twelve (12) month period preceding the birth of the minor child. It was further alleged that the Petitioner had contributed toward the expenses of the birth of the minor child and that said contributions had been accepted by the Respondent and that the Respondent had acknowledged on several occasions the paternity of the Petitioner. The Respondent had filed a motion to dismiss which was heard by the Court on October 21, 1977. The Court, after hearing argumen' , engaged in the following colloquy:

> THE COURT: I am trying to see where you say the statute equates the reciprocal. I don't see it.
>
> MR. ENTIN: Well, Your honor, I gave you the name of a case that stated that. I think I have one or two other cases in our memorandum.
>
> THE COURT: That's after the mother says he's the father of the child.
>
> MR. ENTIN: In other words, what your Honor is saying essentially is that if the mother does

not say that so-and-so is the father of the child in any case, that she never admits that he's the father, that father never has rights to make a determination as to whether or not that child is his child. This is essentially what this Court is saying. If that's the case, I am not going to argue with the Court. Our remedy would be in the appellate level, but I don't think that the motion as presented —

THE COURT: Let's do it this way. Let the Appellate Court decide. I dismiss it with prejudice.

ISSUE ON APPEAL OR REASONS FOR GRANTING THE WRIT

FLORIDA STATUTE §742.011 WHICH AUTHORIZES THE COMMENCEMENT OF A PATERNITY ACTION SOLELY BY THE WOMAN IS A DENIAL OF EQUAL PROTECTION SO AS TO DENY THE ALLEGED FATHER FROM INSTITUTING THE ACTION.

The pending action was a suit initiated by a putative father for the purpose of determining paternity of an illegitimate child so that he might enjoy the benefits attendant thereto.

The District Court of Appeal of Florida, Third District, ruled that:

> In the instant case, Appellee claims that Appellant is the father of the child. We are unaware of any authority which gives a putative father a cause of action to establish that he is the father of a child who the mother denies is his. Chapter 742, Florida Statutes (1977), provides the jurisdictional basis for a court to determine paternity. No case interpreting this Chapter has gone so far as to read into it an intent to give such a cause of action to a putative father. Absent legislative revision of Chapter 742, a putative father is without the right to have himself declared the father of a child who the mother denies is his. *Ford v. Loeffler,* case number 78-325. (Fla. 3 DCA, Opinion filed Sept. 19, 1978).

The Petitioner would respectfully submit that such a limited interpretation of Florida Statute, Chapter 742, would render the statute unconstitutional in violation of the equal protection clauses of the United States and Florida Constitutions.

Florida Statute §742.011 provides, "Any unmarried woman who shall be pregnant or delivered of a child may bring proceedings in the Circuit Court, in Chancery, to determine the paternity of such child."

Said statute has been under judicial attack on numerous occasions for improperly limiting the cause of action only to "any unmarried woman." Such a limitation is in violation of the equal protection clauses of the United States and Florida constitutions. In particular, the Florida Supreme Court held in *Gammon v. Cobb*, 335 So.2d 261 (Fla. 1976) that:

> That portion of Section 742.011, Florida Statutes, which limits action thereunder to unmarried women to be unconstitutional in contravention of Article I, Section 2 of the Constitution of the State of Florida, and the Fourteenth Amendment to the Constitution of the United States. . . .

The *Gammon*, supra, decision recognized that for the purpose of determining the rights of individuals in relation to bastardy proceedings that there was no rational basis for distinguishing between unmarried and married women. It is equally true that there should be no rational basis between the right of women to have a cause of action for determining paternity and the right of a putative father to attempt to determine his rights.

It is generally accepted that a putative father does in fact enjoy certain rights and privileges as to his illegitimate child once paternity is established. For example, the Florida Supreme Court has recognized that the father of an illegitimate child has a cause of action for recovery of damages for the wrongful death of his child. *In Re: The Estate of Daymon C. Burris,* So.2d (Fla., July 20, 1978, case number 52,330). Furthermore, a putative father has the right to visitation and under certain circumstances, custody of the illegitimate child. See *Mixon v. Mize,* 198 So.2d 373 (Fla. 1 DCA 1967) and *Brown v. Bray,* 300 So.2d 668 (Fla. 1974).

In *Mixon v. Mize,* supra, a putative father brought an action against a natural mother in order to determine his rights. The trial court entered a final decree awarding the natural mother custody of the illegitimate child born to her out of wedlock, but in addition, granted the putative father visitation rights with the child. Said action was instituted by the putative father. The First District Court of Appeal of Florida ruled that:

> Although there is a paucity of judicial expression on this issue, the weight of authority in this Country, and what appears to be the sounder view, amply supports the Chancelor's ruling. The courts having occasion to pass upon this question, appear to have uniformly held that where a putative father acknowledges his relationship to an illegitimate child, manifests a genuine interest in the child's welfare and provides it with support, such father should be granted the right to visit the child at reasonable times unless such visits are shown to be detrimental to the child's welfare.

In the case at bar, the putative father was never given a hearing as to the paternity of the child, nor as to his rights to visitation with the child since the trial court determined that the putative father had no right with which to bring any action. Clearly under the dictates of *Mixon v. Mize,* supra, a putative father does in fact have the right to visitation and does in fact have a right to institute proceedings to protect his rights of visitation.

The rights of the putative father were further recognized in the case of *Brown v. Bray,* supra. In that case, a putative father challenged the constitutionality of Florida Statutes Chapter 742, "Because it denies the father of a bastard child the rights the father of a legitimate child enjoys."

The Florida Supreme Court upheld the Statute's constitutionality by reading into it certain rights belonging to the putative father:

> We do not construe Chapter 742 as precluding the Circuit Court in a proper case and upon a sufficient showing from granting the father seeking the same, similar rights of child custody as may be granted a father in a dissolution of marriage situation. We construe the language of Section 742.031 and of Section 742.06 to authorize the Court to enter such order or orders as the equity and justice of the particular matter concerning the custody and support of the subject child may require, inasmuch as a child in a Chapter 742 situation is similarly a ward of the Court as in the case of a child in a dissolution of marriage situation.

Thus the Florida Supreme Court recognizes that a putative father has a right to custody of his illegitimate child and the constitutional law mandates that, "The court shall be open to every person for redress of any injury . . ." Florida Constitution, Article I, Section 21.

This question of whether or not a putative father has a right under the United States Constitution to institute a paternity action has been considered throughout the country. For example, in *Johannesen v. Pfeiffer,* 387 A. 2d 1113 (MA. 1978), the Supreme Court of Maine was called upon to consider the issue expressly raised in the case at bar. In *Johannesen,* supra, the Maine statute gave the mother a procedural right to file a paternity suit. Although the trial court dismissed a putative father who had filed a paternity action under the Maine statute for lack of his standing, the Supreme Court of Maine recognized that the putative father had a constitutional right to file the paternity action.

It is specifically recognized that to allow only the mother the right to seek paternity is a deprivation of the putative father's constitutional rights under equal protection. *Crane v. Battle,* 307 NYS 2d 355 (1970). The putative father's constitutional right to seek a determination of paternity and to seek visitation or custody has further been recognized in *Slawek v. Stroh,* 215 NW 2d 9 (Wisc. 1974); *State ex rel. Lewis v. Lutheran Social Services of Wisconsin and Upper Michigan,* 207 NW 2d 826 (Wisc. 1973); *In Re: Lisa R.,* 119 Cal. Rptr. 475 (Calif. 1975); and *Willmott v. Decker,* 541 P. 2d 13 (Hawaii, 1975).

It must be noted that several of these decisions rest upon this Court's analysis of equal protection as enun-

ciated in *Stanley v. Illinois,* 405 US 645, 92 S. Ct. 1208, 31 L.Ed.2d 557 (1972). "It is now clear that unwed fathers have important interests in their offspring that are entitled to constitutional protection." *Johannesen,* supra. "Moreover it would be unconstitutional, to deprive a petitioner of access to the laws and his only remedy, solely because he is a male." *Crane v. Battle,* supra.

Thus, it was improper for the trial court to dismiss a cause of action by a putative father seeking to determine the paternity of his illegitimate child merely because he did not fall within the express language of Florida Statute 742.011, to wit: Proceedings may be brought by any "woman". Such a determination by the trial court is in direct contradiction to the putative father's constitutional rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Based upon the foregoing facts and case laws, the Appellant-Petitioner respectfully requests this Honorable Court to consider this case on its appellate merits or in the alternative to enter its Writ of Certiorari.

Respectfully submitted,

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305/944-9100

BY /s/
ALVIN E. ENTIN, ESQ.

SUPREME COURT OF FLORIDA

FRIDAY, MARCH 23, 1979

CASE NO. 55,396

District Court of Appeal, Third District
Case No. 77-2395

RICHARD EUGENE PEREZ
PETITIONER,

vs

DARLENE STEVENS
RESPONDENT.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App. P. 9.330(d).

OVERTON, SUNDBERG, HATCHETT, and ALDERMAN, JJ., concur
BOYD, Acting C.J., J., dissents

BDM
C: Hon. Louis J. Spallone, Clerk
Hon. M. Ignatius Lester, Judge
Hon. Ralph W. White, Clerk

Ronald A. Dion, Esquire
Magill, Sevier & Reid, P.A.

A True Copy
TEST:

Sid J. White
Clerk Supreme Court.
By: /s/ Barbara D Maxwell
Deputy Clerk

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1978
FRIDAY, OCTOBER 20, 1978

CASE NO. 77-2395

RICHARD EUGENE PEREZ,

Appellant,

vs.

DARLENE STEVENS,

Appellee.

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy
ATTEST:

/s/
Clerk District Court of
Appeal, Third District

cc: Ronald A. Dion
Magill, Sevier & Reid

/sh

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT IN AND FOR MONROE COUNTY, FLORIDA)

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

CASE NO: 77-2395

RICHARD EUGENE PEREZ,

Appellant,

vs.

DARLENE STEVENS,

Appellee.

MOTION FOR REHEARING OR CERTIFICATION

COMES NOW the Appellant, RICHARD EUGENE PEREZ, by and through undersigned counsel, pursuant to Florida Rules of Appellate Procedure 9.330, and requests a rehearing of this matter, or in the alternative, would request certification of the issue, and would allege in furtherance thereof as follows:

1. The issue presented and ruled upon by this Court was whether a putative father has the right to initiate an action for the purpose of determining the paternity of an illegitimate child.

2. Relying upon the Florida Bastardy Statute, Chapter 742, this Court ruled that, "absent legislative revision of Chapter 742, a putative father is without the right to have himself declared the father of a child who

the mother denies is his. *Ford v. Loeffler,* Case No. 78-325 (Fla., 3 DCA, opinion filed Sept. 19, 1978)."

3. The appellant, putative father, would respectfully submit that such a limited interpretation of Florida Statute, Chapter 742 renders the Statute unconstitutional in violation of the equal protection clauses of the United States and Florida Constitutions.

4. Florida Statute, Chapter 742 has previously been under attack numerous times for violating the concepts of equal protection.

5. In *Brown v. Bray,* 300 So.2d 668 (Fla., 1974), the putative father challenged the constitutionality of the Statute, "because it denies the father of a bastard child the rights the father of a legitimate child enjoys." The Florida Supreme Court upheld the statute's constitutionality by reading into it certain rights belonging to the putative father. "We do not construe Chapter 742 as precluding the Circuit Court in a proper case and upon a sufficient showing from granting the father seeking the same, similar rights of child custody as may be granted a father in a dissolution of marriage situation." Appellant seeks only the right to be able to attempt to establish the sufficient showing which would entitle him to certain rights in reference to his illegitimate child.

6. In *Gammon v. Cobb,* 335 So.2d 261 (Fla., 1976), Florida Statute, Chapter 742 was again attacked on the basis of equal protection. Although Florida Statute 742.011 expressly authorizes a cause of action in determining paternity solely to an "unmarried woman," the Florida Supreme Court ruled such limitation to be unconstitutional. "We hold that portion of Section

742.011, Florida Statutes, which limits actions thereunder to unmarried woman to be unconstitutional in contravention of Article I, Section 2 of the Constitution of the State of Florida, and the Fourteenth Amendment to the Constitution of the United States. . ." Thus, married women were given a cause of action with which to determine paternity.

7. In *In Re: The Estate of Daymon C. Burris,* So.2d (Fla., July 20, 1978, Case No: 52,330), the Florida Supreme Court recognized that the father of an illegitimate child had a cause of action for the recovery of damages for the wrongful death of his illegitimate child.

8. Even the married husband has the legal right to challenge the paternity of "his" child. *Eldridge v. Eldridge,* 16 So.2d 163 (Fla., 1944). "Where a child is born in wedlock, the law extends the right to the reputed father to contest the parentage . . ."

9. If the reputed father has the right to deny paternity, if both unmarried and married women may sue for paternity, and if the father of an illegitimate child has certain rights such as custody and damages for wrongful death, then it is a violation of equal protection to deny him the right to attempt to establish his paternity. Using the criteria and rationale of *Gammon v. Cobb, supra,* there exists no rational basis for denying a putative father his day in Court.

WHEREFORE, Appellant respectfully requests this Honorable Court to grant a rehearing in this cause, or in the alternative, to certify the question for determination by the Florida Supreme Court.

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was furnished by U.S. mail this 4th day of October, 1978, to: MAGILL, SEVIER & REID, P.A., Attorneys for Appellee, 509 Whitehead Street, Key West, Florida 33040.

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By
RONALD A. DION, ESQ.

Richard Eugene PEREZ,

Appellant,

v.

Darlene STEVENS,

Appellee.

No. 77-2395.

District Court of Appeal of Florida,
Third District

Sept. 26, 1978.

Rehearing Denied Oct. 20, 1978.

The Circuit Court, Monroe County, M. Ignatius Lester, J., entered order on mother's motion dismissing putative father's petition for final judgment establishing his paternity as natural and legal father of minor child born out of wedlock to mother. Putative father appealed. The District Court of Appeal, Kehoe, J., held that absent legislative revision of chapter providing jurisdictional basis for a court to determine paternity, putative father was without right to have himself declared father of child who mother denied was his.

Affirmed.

Bastards — 8

Absent legislative revision of chapter providing jurisdictional basis for a court to determine paternity, a putative father is without right to have himself declared father of a child who mother denies is his. West's F.S.A. §742.011 et seq.

Franklin, Ullman, Kimler & Entin, North Miami Beach, and Ronald A. Dion, Miami, for appellant.

Magill, Sevier & Reid and Hector J. Lombana, Miami, Hugh R. Papy, Key West, for appellee.

Before BARKDULL, HUBBART and KEHOE, JJ.

KEHOE, Judge.

Appellant, petitioner below, brings this appeal from an order on respondent's [appellee] motion to dismiss dated November 10, 1977, entered by the trial court dismissing his petition for a final judgment establishing his paternity as the natural and legal father of a minor child born out of wedlock to appellee. We affirm.

At common law, the putative father of an illegitimate child had neither rights nor obligations toward that child. When statutes were devised to protect the interests of illegitimate children, the mother alone was given the right to institute proceedings to determine paternity in order that the innocent child have the benefit of support from the father. See generally *Gammon v. Cobb*, 335 So.2d 261 (Fla. 1976); *Clarke v. Blackburn*, 151 So.2d 325 (Fla. 2d DCA 1963); and *deMoya v. dePena*, 148 So.2d 735 (Fla. 3d DCA 1963).

In the instant case, appellee denies that appellant is the father of the child. We are unaware of any authority which gives a putative father a cause of action to establish that he is the father of a child who the mother denies is his. Chapter 742, Florida Statutes (1977), provides the jurisdictional basis for a court to determine paternity. No case interpreting this Chapter has gone so far as to read into it an intent to give such a cause of action to a putative father. Absent legislative revision of Chapter 742, a putative father is without the right to have himself declared the father of a child who the mother denies is his. *Ford v. Loeffler*, ____So.2d ____(Fla. 3d DCA, opinion filed September 19, 1978). Accordingly, the order appealed is affirmed.

Affirmed.

Supreme Court, U. S.
FILED
JUL 23 1979
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In the Supreme Court of the United States

No. 78-1809

RICHARD EUGENE PEREZ,
Appellant/Petitioner,

vs.

DARLENE STEVENS,
Appellee/Respondent.

APPEAL FROM THE SUPREME COURT OF FLORIDA

[redacted]/RESPONDENT'S REPLY BRIEF

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In the Supreme Court of the United States

No. 78-1809

RICHARD EUGENE PEREZ,
Appellant/Petitioner,

vs.

DARLENE STEVENS,
Appellee/Respondent.

APPEAL FROM THE SUPREME COURT OF FLORIDA

APPELLEE/RESPONDENT'S REPLY BRIEF

PRELIMINARY STATEMENT

The petitioner, RICHARD EUGENE PEREZ, was the plaintiff in the Circuit Court, appellant in the District Court of Appeal of Florida, Third District, and the petitioner in the Supreme Court of Florida. The respondent, DARLENE STEVENS, was the defendant in the Circuit Court, appellee in the District Court of Appeal of Florida, and the respondent in the Supreme Court of Florida. In this reply brief the petitioner will be referred to as PEREZ and the respondent as STEVENS. The symbol that will be used is as follows:

App. for appendix to brief.

STATEMENT OF THE CASE

On January 7, 1977, a petition for final judgment to establish the paternity of Alison Stevens was filed by PEREZ in the Circuit Court, Sixteenth Judicial Circuit of Florida in and for Monroe County (App.1). On May 5, 1977, STEVENS filed her motion to dismiss and/or for summary judgment (App.3). By order dated November 10, 1977, the Circuit Court dismissed PEREZ' complaint, with prejudice (App.6), and he appealed to the District Court of Appeal of Florida, Third District. On September 26, 1978, the Third District rendered its opinion affirming the Circuit Court's dismissal of the PEREZ complaint (App.8). Rehearing was denied by the same Court on October 20, 1978 (App.10). PEREZ filed a petition for writ of certiorari with the Supreme Court of Florida on October 26, 1978, which was denied by that Court on March 23, 1979 (App.11). This appeal or petition for writ of certiorari followed.

STATEMENT OF THE FACTS

STEVENS disagrees with much of PEREZ' statement of the facts and, therefore, restates them for clarification.

On January 7, 1977, PEREZ, a married man, filed his petition for final judgment against STEVENS, who was single at the time, seeking to establish his paternity of Alison Stevens, a minor child, pursuant to the provisions of §742.011, Florida Statutes, F.S.A. (App.1). In the petition, PEREZ alleged that he was the natural father of the child and that STEVENS was the natural mother. The petition failed to allege that the child was illegitimate and also failed to comply with the requirements of

§742.021, Florida Statutes, F.S.A., in that it was not verified (App.1). STEVENS (whose married name is DARLENE STEVENS BANG) filed her verified motion to dismiss and/or for summary judgment *in pro se* prior to retaining counsel. In her motion, STEVENS set forth that the child was the natural born child of her husband, Leif Otto Bang; the child had been legitimatized by her marriage to Leif Otto Bang, who recognized the child as his own, and that a birth certificate for the child had been issued that listed STEVENS as the natural mother and Leif Otto Bang as the natural father of the child. A copy of the child's birth certificate was attached as an exhibit thereto (App.5). On October 21, 1977, the circuit court heard argument on STEVENS' motion and thereafter dismissed PEREZ' complaint, with prejudice, by order dated November 10, 1977. The Circuit Court's order concisely stated that:

> "1. Florida Statutes Chapter 742 precludes the petitioner from seeking a Final Judgment establishing his paternity of Alison Stevens; and
>
> 2. Florida Statutes Chapter 742 et seq., is constitutional." (App.6)

POINT ON APPEAL

Absent Legislative Revision of Section 742.011, Florida Statutes, Providing Jurisdictional Basis for a Court to Determine Paternity, Putative Father Is Without the Right to Have Himself Declared the Father of a Child Who the Mother Denied Is His and Who Has Been Legitimatized by Mother's Marriage to Child's Acknowledged Father.

ARGUMENT

The issue raised by PEREZ with reference to §742.011, Florida Statutes, is misleading and erroneous in that it does not involve a matter which was not raised in the state trial or appellate courts. The Florida courts were presented with the following question, to wit: absent legislative revision of §742.011, Florida Statutes, providing a jurisdictional basis for a court to determine paternity, is a putative father without the right to have himself declared the father of a child whom the mother has denied is his? The Florida courts all answered that question in the affirmative. PEREZ' present position is at odds with Florida law as announced in the case of *Mixon v. Mize,* 198 So.2d 373 (Fla. 1 DCA 1967), in which the District Court of Appeal of Florida, First District, recognized the right of a putative father who had acknowledged his relationship to an illegitimate child, manifested a genuine interest in the child's welfare and provided him with support, to have visitation rights with the child. In *Mixon v. Mize, supra,* the putative father was acknowledged by the natural mother as enjoying that status with respect to the illegitimate child and was the only father known to the child prior to his parents' separation and the natural mother marrying another man. The putative father, although married to another woman during his entire relationship to the natural mother, filed for divorce alleging a common law marriage and praying for a decree of divorce and custody of the illegitimate child. The natural mother did not deny the putative father's claim of paternity of the child but, instead, denied the existence of a common law marriage between the parties and prayed the court to award her custody of the child. The First District decided the rights of the putative father, and, there was

no denial of those rights under Florida law with reference to visitation with the illegitimate child.

By definition a "bastard" is "an illegitimate child," born out of wedlock and who has not been subsequently legitimatized by marriage. *Pettus v. Dawson*, 92 Tex. 18, 17 S.W. 714 (1891). A "putative father" is defined as "the alleged or reputed father of an illegitimate child." *State v. Nestaval*, 72 Minn. 415, 75 N.W. 725 (1898). In this case, at the Circuit Court level, before the Florida appellate courts and in the petition presently pending before this Court, the only person claiming that Alison Stevens is illegitimate is PEREZ, and the only person claiming that he is the "putative father" is PEREZ himself. STEVENS has denied the paternity claim of PEREZ from its inception and, in her verified motion to dismiss and/or for summary judgment, she stated that the child is the natural child of her husband, Leif Otto Bang. STEVENS also set forth in her verified motion that Alison Stevens had been legitimatized by her marriage to Leif Otto Bang, and by his acknowledgement of the child as his which culminated in the official change of the child's birth certificate from STEVENS' maiden name to Bang's surname. During the proceedings before the Circuit Court, and in particular of the time of the hearing on STEVENS' motion, the Circuit Court recognized the lack of any evidence to traverse the facts recited therein that the child was not illegitimate but was, in fact, "legitimate." The Circuit Court stated that §742.011, Florida Statutes, et seq., applied only where an illegitimate child was involved. The trial court, in addition to the colloquy set forth on page 7 of PEREZ' brief, also stated in response to the argument of PEREZ' counsel as to the applicability of §742.011, Florida Statutes, the following:

> "No, but that only applies if there is an illegitimate child. Somehow there is a recognition that the child

is the illegitimate child of the man. I think you've got one hurdle to make before you start." (App.7)

In dismissing the PEREZ complaint, with prejudice, the Circuit Court acted in accordance with the Florida law in refusing to allow any relief pursuant to the statute because it was not shown that an illegitimate child was involved. It is fundamental under Florida Bastardy Law, Chapter 742, Florida Statutes, that before any party is entitled to relief pursuant thereto, a determination or showing that the child *is a bastard* is necessary in order for a petitioner to be entitled to any relief as a matter of law. See, *State v. Roe,* 99 Fla. 1032, 128 So. 7 (1930); *Bishop v. State,* 136 Fla. 268, 186 So. 413 (1939); and *Lorenz v. Jiminez,* 163 So.2d 500 (Fla. 3 DCA 1964).

In the *Lorenz* case, *supra,* the court dealt with the requirements which would entitle a party to relief under §742.011, Florida Statutes, *et seq.,* and determined that in order for any party to be entitled to any relief under the Florida Bastardy Statutes, the child in question had to be illegitimate.

In the instant case an attempt is being made by PEREZ, a married man, by means of a bastardy proceeding to legally stigmatize the origin of a child who was born out of wedlock but subsequently legitimatized. That is the type of inexplicable legal action which PEREZ would like to have this Court condone as being in the best interests of the child.

PEREZ' issue on appeal is not supported by the facts of the case at bar. The purported unconstitutionality of §742.011, Florida Statutes, for improperly limiting a cause of action to determine the paternity of an illegitimate child solely to the mother was never a question because the legitimacy of Alison Stevens was never properly brought into issue by the facts presented to the various

state courts. The District Court of Appeal of Florida, Third District, in disposing of PEREZ' appeal from the Circuit Court's dismissal of his complaint, with prejudice, held that:

> "In the instant case, Appellee denies that Appellant is the father of the child. We are unaware of any authority which gives a putative father a cause of action to establish that he is the father of a child who the mother denies is his. Chapter 742, Florida Statutes (1977), provides the jurisdictional basis for a Court to determine paternity. No case interpreting this Chapter has gone so far as to read into it an intent to give such a cause of action to a putative father. Absent legislative revision of Chapter 742, a putative father is without the right to have himself declared the father of a child who the mother denies is his." See, *Ford v. Loeffler*, 363 So.2d 23 (Fla. 3 DCA 1978) (App.9-10)

The instant case contains additional factors not found in the *Ford v. Loeffler* case, *supra*, those being that the natural mother, subsequent to the birth of the child, married the father of the child who acknowledged the child as his own and the child's name on the birth certificate was accordingly changed to that of the acknowledged father.

The cases relied upon by PEREZ in his brief[1] are readily distinguishable on the facts and the law from the

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1. *Stanley v. Illinois*, 405 U.S. 645 (1972); *In Re Estate of Burris*, 361 So.2d 152 (Fla. 1978); *Ford v. Loeffler*, 363 So.2d 23 (Fla. 3 DCA 1978); *Johannesen v. Pfeiffer*, 387 A.2d 1113 (Maine 1978); *Gammon v. Cobb*, 335 So.2d 261 (Fla. 1976); *In Re: Lisa R.*, 119 Cal. Rptr. 475 (Calif. 1975); *Willmott v. Decker*, 541 P.2d 13 (Hawaii 1975); *Brown v. Bray*, 300 So.2d 668 (Fla. 1974); *Slawek v. Stroh*, 215 N.W.2d 9 (Wisc. 1974); *State ex rel. Lewis v. Lutheran Social Services of Wisconsin*, 207 N.W.2d 826 (Wisc. 1973); *Crane v. Battle*, 307 N.Y.S.2d 355 (1970); and *Mixon v. Mize*, 198 So.2d 373 (Fla. 1 DCA 1967).

situation here present. The cited cases deal with the issue of paternity in situations where the child involved was admittedly illegitimate. That essential condition precedent to maintaining a paternity action is non-existent in the case, *sub judice,* because Alison Stevens is legitimate. Further, PEREZ sought no affirmative relief as a putative parent such as child custody, visitation or support, but merely prayed the Court for a bare declaration of his paternity of a legitimate child. The Constitutional protection pronounced in cases such as *Stanley v. Illinois,* 405 U.S. 645 (1972), is directed at putative parents' rights such as child custody, visitation, participation in adoption proceedings and support. None of the cases cited by PEREZ have elevated an action to obtain a bare declaration as to the paternity of a child, without seeking some other affirmative relief, to a constitutionally protected right. Further, in proceedings where the rights of putative parents are litigated, the courts have viewed such situations on an individual case basis and have kept the interests of the child paramount in any decision that has been rendered. *Stanley v. Illinois, supra.*

Assuming, *arguendo,* that PEREZ had raised sufficient facts to challenge the constitutionality of Chapter 742, Florida Statutes (1977), or its application to this particular case, his appeal or alternative petition for writ of certiorari to this Court is inappropriate because he does not raise a substantial federal question. In two recent decisions, *Parham v. Hughes,* 47 U.S.L.W. 4457 (opinion filed April 24, 1979), and *Lalli v. Lalli,* 47 U.S.L.W. 4061 (opinion filed December 11, 1978), this Court upheld the validity of state illegitimacy statutes. The rationale in both of these cases was that gender based distinctions in illegitimacy statutes do not violate equal protection when the statutory classifications are rationally related to specified legitimate state interests. This principle has been followed

in Florida cases that have constitutionally upheld the challenged bastardy statute in situations where the statutory difference had a just and reasonable relationship to a legitimate state purpose. *Reed v. Reed,* 354 So.2d 864, 865 (Fla. 1978) and *Gammon v. Cobb,* 335 So.2d 261 (Fla. 1976).

The purpose of §742.011, Florida Statutes, is to provide a mechanism "whereby a woman seeks to have one who is unwilling to accept the burdens of parenthood adjudicated the father of her child so that he may be legally compelled to accept those responsibilities." *Knauer v. Barnett,* 360 So.2d 399 (Fla. 1978). The law serves the important objective of providing support for illegitimate children without making them a burden on the State. The sole effect of this statute is to provide for a basis of recovery from the natural father to support his child, because a natural mother bears the responsibility of providing support for her child. The identity of a child's mother is evident and no legal action is needed to legalize a mother's responsibility to support her child.

Moreover, the welfare of the child is at stake here. If PEREZ is allowed to obtain a bare declaration as to his status as a parent of an otherwise legitimatized child, it would thrust strong undesirable effects upon the mother and, more importantly, the child. It would also disrupt the integrity of a family in which a child born out of wedlock has been subsequently legitimatized.

This example illustrates that the challenged Florida statute is in compliance with this Court's holding in *Califano v. Webster,* 430 U.S. 313 (1977), in that it serves an important governmental objective, the cushioning of the financial impact from the birth of an illegitimate child upon that sex for which that event has traditionally imposed the heavier burden, and classification contained

therein is substantially related to achieving those objectives. Therefore, it does not violate the equal protection clause.

PEREZ has failed to show any arbitrary discrimination pursuant to the Florida illegitimacy statute or any lack of compelling state interest. Laws distinguishing between males and females have been upheld by this Court where a reasonable basis for such classification has been found. *Kahn v. Shevin*, 416 U.S. 351 (1974). PEREZ has failed to meet the threshold requirements in asserting a due process challenge, precluding the constitutional issue from being reached.

CONCLUSION

For the reasons hereinabove set forth, should the Court elect to treat PEREZ' petition as an appeal, then the decision of the Florida Courts should be affirmed. Alternatively, should the Court choose PEREZ' petition as an application for writ of certiorari, then the petition should be denied.

Respectfully submitted,

By EDWARD L. MAGILL
MAGILL, SEVIER AND REID, P. A.
Suite 730 Ingraham Building
25 Southeast Second Avenue
Miami, Florida 33131
Attorneys for Appellee/Respondent

APPENDIX

CHAPTER 742, FLORIDA STATUTES, F.S.A. (1977) DETERMINATION OF PATERNITY

742.011 Determination of paternity proceedings; circuit court jurisdiction

Any unmarried woman who shall be pregnant or delivered of a child may bring proceedings in the circuit court, in chancery, to determine the paternity of such child.

742.021 Same; venue, process, complaint

The proceedings shall be by verified complaint filed in the circuit court of the county in which the woman resides or of the county in which the alleged father resides. The complaint shall aver sufficient facts charging the paternity of the child. Process directed to the defendant shall issue forthwith requiring the defendant to file his written defenses to the complaint in the same manner as suits in chancery. Upon application and proof under oath, the court may issue a writ of ne exeat against the defendant on such terms and conditions and conditioned upon bond in such amount as the court may determine.

PETITION FOR A FINAL JUDGMENT ESTABLISHING PATERNITY OF ALLISON STEVENS

(Filed January 7, 1977)

COMES NOW the Petitioner, RICHARD EUGENE PEREZ, and moves this Honorable Court for the entry

of a Final Judgment establishing the paternity of Allison Stevens, and as grounds therefore, states as follows:

1. That RICHARD EUGENE PEREZ is the natural father of Allison Stevens, the minor child for whose benefit the above entitled proceeding is being brought.

2. That DARLENE STEVENS is the mother of Allison Stevens the minor child for whose benefit the above preceding the birth of the minor child.

3. That Allison Stevens was born out of wedlock on the 22nd day of June, 1976, at Key West, Monroe County, Florida.

4. That DARLENE STEVENS has never been married and was not married during the 12 month period preceeding the birth of the minor child.

5. That RICHARD EUGENE PEREZ contributed towards the expenses of the birth of the minor child by both cash and checks.

6. That DARLENE STEVENS accepted said contributions in both cash and check.

7. That DARLENE STEVENS has acknowledged on several occasions that RICHARD EUGENE PEREZ is the natural father of Allison Stevens.

WHEREFORE, the Petitioner prays this Honorable Court to enter a Final Judgment declaring that RICHARD EUGENE PEREZ is the natural father and legal father of Allison Stevens.

s/ Richard Eugene Perez
RICHARD EUGENE PEREZ

s/ Manuel W. James
MANUEL W. JAMES
Attorney for Petitioner
P. O. Box 1057
Key West, Florida 33040

MOTION TO DISMISS AND/OR SUMMARY JUDGMENT

(Filed May 5, 1977)

COMES NOW the Defendant, DARLENE STEVENS BANG, the former DARLENE STEVENS, and moves this Court for an Order Dismissing this cause with prejudice and alleges as follows:

1. That she, Darlene Stevens Bang, is the natural mother of the minor child Alison Stevens Bang.

2. Leif Otto Bang is the natural father of the minor child Alison Stevens Bang.

3. The minor child was born out of wedlock, but the natural parents were married on the 4th day of April, 1977 at Williamstad, Curacao, Netherlands Antiles.

4. The minor child was legitimized by the subsequent marriage of the natural parents.

5. The Department of Health and Rehabilitative Services issued a birth certificate showing the said Darlene Stevens Bang and Leif Otto Bang as the natural parents of the said Alison Stevens Bang. A copy of the Certificate of Live Birth is attached hereto and by reference made a part hereof.

s/ Darlene Stevens Bang
DARLENE STEVENS BANG

STATE OF FLORIDA

ss

COUNTY OF MONROE

BEFORE ME the undersigned authority personally appeared DARLENE STEVENS BANG, to me well known and known to me to be the person described in and who executed the foregoing instrument, and acknowledged to and before me that she has read the foregoing instrument and fully understands the contents thereof, and acknowledged to and before me that she executed the said instrument for the purpose therein expressed.

WITNESS my hand and official seal this 5th day of May, 1977.

s/ Raymond R. Lord
Notary Public - State of Florida
My Commission Expires: 1-18-81

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss and/or Summary Judgment was mailed to the office of ALVIN E. ENTIN, ESQ., Attorney at Law, 2020 N. E. 163rd Street, Suite 300, North Miami Beach, Florida 33162, this *5th* day of May, 1977.

s/ Darlene Stevens Bang
DARLENE STEVENS BANG

CERTIFIED COPY

I HEREBY CERTIFY THE COPY REPRODUCED BELOW TO BE A TRUE AND CORRECT COPY OF THE ORIGINAL RECORD ON FILE IN THE BUREAU OF VITAL STATISTICS OF THE STATE OF FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES AT JACKSONVILLE FLORIDA

NOT VALID UNLESS THE SEAL OF THE STATE OF FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES IS AFFIXED

MAY 3 1977

Everett H. Williams, Jr.

STATE REGISTRAR OF VITAL STATISTICS
FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

State of Florida
Department of Health and Rehabilitative Services
VITAL STATISTICS

CERTIFICATE OF LIVE BIRTH
FLORIDA

BIRTH NO 109- 76-044081

REGISTRAR'S NO 288

Alison	Stevens	Bang	June 22, 1976	7:15p
Female	Single			Monroe
Key West	Yes	Florida Keys Memorial Hospital		
Darlene	Ann	Stevens	21	Virginia
Florida	Monroe	Key West	33040	Yes	1010 Varela Street
Leif	Otto	Bang	32	Norway
Mrs. Leif O. Bang				Mother
E. H. Williams, Jr.		June 24, 1976		M.D.
E. H. Williams, Jr.		1217 Pearl St. Jacksonville, FL., 32202		
Dovie A. Casas			June 30, 1976	

App.5
BIRTH CERTIFICATE

IN THE CIRCUIT COURT OF THE 16th JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA.

CASE NO. 77-20-CA-18

RICHARD EUGENE PEREZ,
Petitioner,

vs.

DARLENE STEVENS,
Respondent.

ORDER ON RESPONDENT'S MOTION TO DISMISS

THIS CAUSE CAME on to be heard pursuant to Respondent's Motion to Dismiss Petitioner's Complaint. And the Court, after hearing argument of Counsel, and reviewing the Court file including Petitioner Counsel's Memorandum of Law in opposition to Respondent's Motion to Dismiss, hereby makes the following findings of fact:

1. Florida Statutes chapter 742 precludes the Petitioner from seeking a Final Judgment establishing his paternity of Allison Stevens.

2. Florida Statutes chapter 742 et seq., is constitutional.

Based upon the foregoing findings of fact, it is hereby ORDERED AND ADJUDGED:

1. Petitioner's petition for a final judgment establishing paternity of Allison Stevens is dismissed against the petitioner with prejudice.

DONE AND ORDERED in Chambers, Monroe County this 10th day of November, 1977.

M. IGNATIUS LESTER
Judge Circuit Court

Copies furnished to:
Richard C. Entin
Hugh Papy

EXCERPT FROM TRANSCRIPT OF HEARING ON MOTION TO DISMISS HELD ON OCTOBER 21, 1977, IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MONROE COUNTY, FLORIDA AT PAGE 8

THE COURT: No, but somehow that only applies if there is an illegitimate child. Somehow if there is recognition that the child is the illegitimate child of a man. I think you have got one hurdle to make before you start—

OPINION

Richard Eugene PEREZ,
Appellant,

v.

Darlene STEVENS,
Appellee.

No. 77-2395.

District Court of Appeal of Florida,
Third District

Sept. 26, 1978.

Rehearing Denied Oct. 20, 1978.

The Circuit Court, Monroe County, M. Ignatius Lester, J., entered order on mother's motion dismissing putative father's petition for final judgment establishing his paternity as natural and legal father of minor child born out of wedlock to mother. Putative father appealed. The District Court of Appeal, Kehoe, J., held that absent legislative revision of chapter providing jurisdictional basis for a court to determine paternity, putative father was without right to have himself declared father of child who mother denied was his.

Affirmed.

BASTARDS—8

Absent legislative revision of chapter providing jurisdictional basis for a court to determine paternity, a putative father is without right to have himself declared father of a child who mother denies is his. West's F.S.A. §742.011 et seq.

Franklin, Ullman, Kimler & Entin, North Miami Beach, and Ronald A. Dion, Miami, for appellant.

Magill, Sevier & Reid and Hector J. Lombana, Miami, Hugh R. Papy, Key West, for appellee.

Before BARKDULL, HUBBART and KEHOE, JJ.

KEHOE, Judge.

Appellant, petitioner below, brings this appeal from an order on respondent's [appellee] motion to dismiss dated November 10, 1977, entered by the trial court dismissing his petition for a final judgment establishing his paternity as the natural and legal father of a minor child born out of wedlock to appellee. We affirm.

At common law, the putative father of an illegitimate child had neither rights nor obligations toward that child. When statutes were devised to protect the interests of illegitimate children, the mother alone was given the right to institute proceedings to determine paternity in order that the innocent child have the benefit of support from the father. See generally *Gammon v. Cobb*, 335 So.2d 261 (Fla. 1976); *Clarke v. Blackburn*, 151 So.2d 325 (Fla. 2d DCA 1963); and *deMoya v. dePena*, 148 So.2d 735 (Fla. 3d DCA 1963).

In the instant case, appellee denies that appellant is the father of the child. We are unaware of any authority which gives a putative father a cause of action to establish that he is the father of a child who the mother denies is his. Chapter 742, Florida Statutes (1977), provides the jurisdictional basis for a court to determine paternity. No case interpreting this Chapter has gone so far as to read into it an intent to give such a cause of action to a putative father. Absent legislative revision of Chapter 742, a putative father is without the right to have himself declared the father of a child who the mother denies is his. *Ford*

v. Loeffler, ... So.2d ..... (Fla. 3d DCA, opinion filed September 19, 1978). Accordingly, the order appealed is affirmed.

Affirmed.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1978

FRIDAY, OCTOBER 20, 1978

CASE NO. 77-2395

RICHARD EUGENE PEREZ,
Appellant,
vs.
DARLENE STEVENS,
Appellee.

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy
ATTEST:
/s/
Clerk District Court of
Appeal, Third District

cc: Ronald A. Dion
Magill, Sevier & Reid

/sh

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT IN AND FOR MONROE COUNTY, FLORIDA)

SUPREME COURT OF FLORIDA

FRIDAY, MARCH 23, 1979

CASE NO. 55,396

District Court of Appeal, Third District
Case No. 77-2395

RICHARD EUGENE PEREZ
PETITIONER,

vs.

DARLENE STEVENS
RESPONDENT.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P.9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App. P. 9.330(d).

OVERTON, SUNDBERG, HATCHETT, and ALDERMAN, JJ, concur

BOYD, Acting C.J., J., dissents

BDM

C: Hon. Louis J. Spallone, Clerk
Hon. M. Ignatius Lester, Judge
Hon. Ralph W. White, Clerk

Ronald A. Dion, Esquire
Magill, Sevier & Reid, P.A.

A True Copy
TEST:
Sid J. White
Clerk Supreme Court.

By: /s/ Barbara D Maxwell
Deputy Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellee/Respondent's Reply Brief to the Supreme Court of the United States was this ..... day of ....., 1979, mailed to Franklin, Ullman, Kimler & Entin, P. A., Attorneys for Appellant/Petitioner, 2020 N. E. 163rd Street, Suite 300, North Miami Beach, Florida 33162.

By EDWARD L. MAGILL, ESQ.